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ABSTRACT

There is no more fundamental right in our system than the right of privacy--the right to be let alone. Current trends lead to a major assault on this right, and one of the great tests of the viability of our system is its ability to preserve this right in the face of increasing complexity and increasing needs for control. As part of the scientific community, educational researchers contribute to the assault on privacy; and it is part of their responsibility to counter this movement and to preserve our basic values. It is obvious that strong action on the part of the American Educational Research Association is needed and needed soon. Topics discussed include historical background, common law, appropriation, public disclosure, the constitution, recent legislation and court findings, current needs and problems, and the critical need for guidelines and policies. (RC)

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Rights of Privacy and Research Needs: A Problem Whose Time Has Arrived

by

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A. The Issue

We live in an age in which technolgy threatens to overwhelm us all, in which the dire descriptions of 1984 no longer seem like science-fiction oddities, but more like conditions in which we may immediately find ourselves.

Luis Mumford (1973, pp. 279-292), among others, has noted an unanticipated effect of technolgy. Initially, we turn to it for help in solving particular problems, and most of the time the original purpose is served. But to our surprise, the technology itself creates more problems than existed in the first place, and more technology is needed for solutions. This continues in an ever broadening cycle, and soon, like the sorcerer's apprentice, we are in danger of being swept away by the flood we have created.

In a real sense, this is the situation in which we currently find ourselves. Life has become more and more complex, bigness abounds everywhere, and the population and attendant pressures increase. In this milieu, laissez faire clearly will not suffice; rather, more and more control over more and more elements of the social system is needed merely to preserve order and maintain some sort of workable stability. Given what appears to be an inevitable

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trend toward greater centralization and control, the greatest challenge to American democracy, in my mind, is to maintain the sanctity of the individual, which is expressed in one way in our system through the notion of rights of privacy.

I had the good fortune of visiting the Soviet Union with the Phi Delta Kappa group in November of 1974, and I observed as closely as I could to try to get a first-hand sense of the differences between their society and ours. I found, somewhat to my surprise, that (at least in the sections I visited) the everyday lives of ordinary citizens of the two countries are rather similar. The difference lies not in whether a person can go to the store, drive across town, visit and talk with friends, attend a movie, and such. It is at a more fundamental level. Citizens of the Soviet Union are not informed, a feature I found quite oppressive, and do not participate in the basic decisions of government. There are no rights of individuals, but rather only rights of the society as a whole. So, I believe, the most fundamental difference between our society and that of the Soviets is the sanctity of the individual which we hold dear. And it is this which we must preserve at all costs, or we have lost the way of life which this country was founded to produce and protect.

The issue of rights of privacy, therefore, is not trivial or even of moderate importance. It is perhaps the most basic issue we could be discussing at this convention, and it is an issue to which we must devote more and more attention as the pressures against these rights mount. As Justice Douglas stated it, "The right to be let alone is indeed the beginning of all freedom (1952)."

I do not mean to sound like a prophet of doom in this introduction. We educational researchers are a good and wholesome sort, as we are all aware, whose prime motivation is to improve the state of humankind. Like all wombat missionaries (Hayman and Clemson, 1975-76, pp. 7-8), however, we stand in danger of being carried away with our own interest and of losing sight of the larger purpose. I suspect we are particularly susceptible to a malady described in this way by Arthur R. Miller:

> The new information technologies seem to have given birth to a new social virus -- "data-mania." Its symptoms are shortness of breath and heart palpitations when contemplating a new computer application, a feeling of possessiveness about information and a deep resentment toward those who won't yield it, a delusion that all information handlers can walk on water, and a highly advanced case of astigmatism that prevents the affected victim from perceiving anything but the intrinsic value of data (1970, p. 37).

No matter how righteous our motives, we are a part of the scientific community which has given birth and sustenance to technology, and indeed one of our prime objectives is to move technology to the core of the instructional process (Tickton, 1970, p. 7-11). In this very act, we are contributing to the assault on the rights of privacy, and it is clearly incumbent on us to take whatever counter measures are necessary to offset the effects of the technology produced through our efforts. This is our responsibility, and fortunately, as this panel attests, we are beginning to recognize it. The unanswered question is what do we do about it.

B. Historical Background

It should be clear by now that, rather than speak to the topic

assigned to me in the program ("The Reaction of an Educational Development Laboratory"), I am going to attempt to deal with the issue at hand at a more basic level. Instead of asking, "How do we cope with these restrictions which have been laid on us?", I want to get more into the essence of the problem and explore with my fellow researchers what is really at stake and what our larger responsibilities are. I know I run the risk of overlapping Dave Carter a bit, and I offer my apologies to him in advance.

The privacy concept as we know it is really a development of English and American law and political philosophy. The idea of the individual having rights which can stand against the state is usually traced in its historical roots to Magna Carta. It became a part of the English common law, which developed over the next five centuries and became the foundation of the American common law system, and of the English constitutional system. The founding fathers, while indebted to England for their law and most of their ideas about government, were not content with an unwritten constitution, as we know, and so the individual rights and privacy concepts were given explicit statement in our own Constitution and in later amendments. In the meantime, various laws have been passed at state and national level relating to the matter. Our current position on privacy rights developed historically through three streams: through common law, through the Constitution, and through legislative enactments and their applications.

The Common Law. Common law (as contrasted to criminal law) is primarily concerned with the redress of one citizen for some wrong perpetrated by another. It has developed slowly over the centuries

by precedent and has been said to reflect more the felt necessities of the times, the prevalent moral and political theories, and intuitions of public policy rather than logic (Holms, 1881).

The idea of a specific right of privacy which involved intangible wrongs which could be redressed began to take shape in the United States at the end of the nineteenth century. Before that, the courts were more concerned with property rights and with wrongs which were likely to lead to violence.

The concept developed rapidly (if unsystematically) in common law in the twentieth century and was recently summarized by Prosser (1956) as involving four categories of actions: appropriation, intrusion, public disclosure, and false light and defamation.

Appropriation encompasses the unauthorized use of a person's picture or name, usually for commercial purposes. This does not seem likely to affect us in educational research.

The second category involves intrusion into a person's solitude or his personal affairs. Typical is the case in which a married man sued his landlord for installing a listening and recording device next to the tenant's bed. While most of us would likewise take umbrage at such prying into intimate conjugal affairs, we rather blithly accept the deliberate deceiving of subjects in experiments designed to test some reaction of which the subjects are not aware. (See, for example, Milgram, 1963.)

Public disclosure involves making public embarrassing private facts about a person. There are two prerequisites for a successful action in this category. First, there must be public disclosure, that is, the private information must be divulged to more than one

other person. Second, the revealed facts must in fact be private. A person cannot sue, for example, because his activities on a public street are revealed to someone not at the scene. It has been suggested that the "zones of privacy" should include the psyche or matters of psychology (Batt, 1968). While there are no clear cut guidelines, this could presumably be construed as including the results of a psychological test. Generally, the courts hold that the disclosure must be "offensive to a person of 'ordinary sensibilities'." (Miller, 1970, p. 196). Whether my answers to some of the questions on the MMPI would meet this test is an interesting matter.

If the private information revealed about a person is not accurate, the usual remedy is through an action in the false light and defamation category. This type of action does not seem to be of as direct concern to researchers as the immediately preceding two, though it might well be that relief could be sought for public disclosure of some counselor, teacher, or psychologist's subjective evaluation.

To review briefly, we are discussing common law applications. These have not been of much concern to educators in the past, but with certain recent events -- such as the publication required in connection with the Buckley amendment -- more suits in common law may well occur. More important, according to the argument of the first section of this paper, is that we try to understand the principles being drawn.

The Constitution. A second developmental stream for the privacy concept in the United States has been through the Constitution and related law. One of the primary purposes of the framers of the

Constitution was, of course, to protect the citizen from intrusions by the government, and many specific rights have been spelled out in the amendments.

The First Amendment is of special interest because it gives rise to part of whatever conflict there is between confidentiality and the right to know. The freedom of the press and free speech guarantees are the foundation of whatever "right to know" we have. The original idea, of course, was to provide the means for the citizenry to stay informed so that it could govern itself. Freedom of the press has been jealously guarded as a right accruing to the society as a whole, and many cases have dealt with the conflict between this right and the individual's right to privacy.

The First Amendment is also the basis for what is termed "associational privacy" (Miller, 1970, p. 215), that is, the individual's right to associate with whatever group he likes in such areas as politics, economics, religion, and culture. The government is prevented from securing information related to these associations. Closely related to this is a right, protected by the courts, to possess ideas and beliefs free from governmental intrusion. One wonders what would happen if a suit were brought protesting psychological testing, observations, and/or other data gathering activities on these grounds.

The Third Amendment's prohibition against quartering soldiers in private homes, the Fourth Amendment's protection against unreasonable searchers and seizures, and the Fifth Amendment's right against self-incrimination are all based partly on the right to be let alone by the government (Miller, 1970, pp. 218-220), which was

characterized by Brandeis as "the most comprehensive of rights and the right most valued by civilized men" (Brandeis, 1928).

Note again that the Constitution protects against intrusion by the government. The private sector is unaffected by constitutional restraints, but must depend on the common law.

According to Miller:

> Although many aspects of individual privacy are recognized by the law and are protectible either on a constitutional basis or by means of a private common-law action, the available protection is not adequate to meet the threat to informational privacy that already exists and is certain to become more acute in the future. The delicate balance of power between the individual and those institutions in society that affect his daily life already may be shifting against him (1970, p. 220).

The "delicate balance" is what we are concerned with in this meeting -- the balance between the individual's right to privacy in our society and the flow of information necessary to protect the public interest. I can well understand the necessity of jealously guarding freedom of the press and of forcing the government to reveal facts about itself. We were treated during the Watergate affair to the dangers of secrecy even in this democracy. In general, however, I believe there can be little doubt that the greatest danger in the delicate balance is to individual privacy. Computers, electronic eavesdroppers, and other elements of our technology assure that. Accordingly, any extension of information flow in the public interest should bear a heavy burden of proof, and I am still not certain by what logic we as educational researchers can claim that our work is strongly enough in the public interest to swing the balance. Teachers and others in the educational enterprise dealing directly with the well-being of children have a far stronger case, I believe, and even they find themselves under new restrictions.

Recent Legislation and Court Findings. Whatever argument we as researchers can make, in the general field of education, several recent developments have focused on privacy rights of students. The general trend, starting in the late 1960's, has been to recognize students as citizens who enjoy the civil rights secured to all citizens by the Constitution and by various acts of Congress (Blankenburg, 1971). In fact, the Constitution does not differentiate citizens by age and presumably the founding fathers intended that the rights guaranteed therein applied to children as well as to adults.

Authorities for a long time agreed that juveniles should receive less constitutional protection than adults (Brothers, 1975, p. 3). In the Gault Case in 1967, however, there was judicial approval of the movement to grant more constitutional rights to young people. In a 1969 Wisconsin case, the judge stated:

> The argument that school authorities stand in loco parentis to the student is a tired, worn out slogan. . . . That nefarious doctrine, in loco parentis, has been employed to heap adult abuse against children by judges and courts as well as teachers in the schools. The prejudice and frustrations of people in power cannot be given unbridled license as practiced against children under the hypocritical disguise that the acts committed against them are for the children's own good (Wisconsin, 1969).

The judge went ahead to affirm the principle that a student is a citizen with all the rights of a citizen under the Constitution.

Other recent cases have followed suit and have dealt with such matters as free speech, the right of association, and privacy. Courts have held that students have the right to due process.

Recognizing the problems that schools would have in dealing with these trends, the Russell Sage Foundation in 1969 dealt with a part of the issue by publishing a set of suggested guidelines for the

collection, maintenance, and dissemination of pupil records (Russell Sage, 1969). A distinguished group of educators and lawyers drew up the guidelines. Among other things, this group suggested that many types of data collected for research purposes should require individual consent of each child and/or his parents (pp. 16-17, 34).

The Russell Sage guidelines have been widely quoted and presumably have had major effect in the passage of the so-called Buckley Amendment, which gave many of the suggestions the force of law.

As most people in this meeting probably know, the Buckley amendment is known officially as the Family Education and Privacy Act of 1974. It is part of the Education Amendments of 1974 and is technically an amendment to ESEA. The effect of the Buckley amendment is that, if parents (or students 18 or older) are denied access to school files, records, and other documents containing personal data, the institution involved will lose all federal funding (Cutler, 1975, p. 47).

If the accuracy of a student's records is challenged, the school district (or other official organization) must provide a hearing, and any corrections which are due must be made. Records must also be made available to teachers and other school personnel who have a legitimate educational interet in seeing them.

Anyone else who wants to examine a student's records must get written consent, or have a subpoena. The person requesting access must sign a written form indicating the interest he or she has in looking at the records.

The law provides that school districts must notify parents and students of their rights, as outlined in the amendment.

The way this will affect school practice is uncertain at present. There is a question of the extent to which the amendment conflicts with current state laws, for example, and many terms, such as "legitimate educational interest" must be defined through practice. Also, the act of "notifying" is not defined. The law is new, and, as with any law, its precise operational meaning will have to be worked out through trials and testing.

The general intent is clear, however, and it is to give more precise legal definition to and greater protection to the rights of privacy of students. It will undoubtedly cast a burden on educational agencies, but there can be no doubt of the need nor of the wisdom at this time of passing the law. School districts and other agencies have been very lax in the past in handling individual records, and they generally operated without clearly defined policy in this area. The inefficiency of data collecting and processing methods in the past meant that this laxness was of little danger. Computers and other current technological developments have changed this, however, and made it incumbent that the issue be addressed.

C. Current Needs and Problems

Research Needs in the Larger Context. All of this brings us back to the major purpose of this meeting, that is, to draw some kinds of conclusions regarding an educational researcher's "right to know," particularly as this right balances against the individual's rights of privacy.

Any right to know, as noted above, is an extension of First Amendment guarantees that the interest of the public be preserved, and so the matter turns on a determination of what is in the public interest. We know that the original concern was with controlling governmental power and with preventing arbitrary abuses by the government. It was in the public interest to force the government to be open in its operations and to disclose information about itself. It has since been found in the public interest to guard some secrets, on the one hand, and to allow a certain amount of intrusion (in such areas as the census and income taxes), on the other. In each instance, the burden is on the person or agency to show why a departure from accepted procedure is merited.

I don't know that we can make an argument that all educational research is in the public interest. Gallagher and Sanders (1976, pp. 1-2) make a very eloquent statement about the value of educational research in the most recent edition of the Educational Researcher. Even they must stay at a relatively abstract level, and all of us are well aware of research efforts which are poorly conceived and/or are poorly conducted. As a consulting editor for both the Journal of Educational Research and Educational and Industrial Television, I see many articles which obviously represent nothing more than the author's attempt to play the academic game and add to his publications list. As an advisor of graduate students, a member of various doctoral committees, and a sometimes project director, I am at times taken aback with the audacity of would-be researchers in pursuing data. Given these experiences, I could not endorse any kind of blanket statement of the public interest being served by educational research, and I am sure that anyone who gives it much thought will agree. Each individual instance,

rather, will have to stand on its own merits.

If the researcher is dealing with group data or otherwise in a situation where individuals cannot be identified, then obviously there is no problem, for one's privacy is not threatened. Perhaps many of the potential problems can be avoided by working out procedures through which school research offices can make available data stripped of its individual identity.

If individuals must be identified, as when measuring instruments must be given to individuals, then the privacy issue must be considered. In this case, the researcher can avoid difficulty by securing signed consent from each subject (or each subject's parent or guardian, for persons under 18). Even this situation is not simple, however. Freely given consent is one thing, but consent given under what appears to be coercion or under false pretenses is not sufficient. A balky subject is irritating, and we sometimes have the urge to say, "But this is being done under the direction of the Board of Education." The implication may be that the subject is legally required to give the information or that failure to give it may jeopardize the subject's standing in school in some way. The threat does not have to be stated directly. The courts have held that a strong implication will constitute coercion.

The final situation is that in which individually identifiable data are used without the subject's consent. Given the historical background and the importance of the basic issue, I can think of no instances where this is justified. In my opinion, justification for use of data in this manner would have to be very specific and very strong. To be honest, I have gathered a lot of data from cumulative records and other sources without getting signed consent, and I know

how irritating it will be to have to go the extra step. As we have said before, however, this is no trivial matter, and our laxness of the past is no excuse for careless practices in the future.

In the latter two instances, the nature of the data must obviously be considered. Some kinds of information on individuals is relatively harmless, and other kinds obviously is not. The Russell Sage guidelines distinguish among data types, but I am not aware of other efforts in education to consider this point.

Guidelines and Policies: A Critical Need. Talking about the issue as we have in this symposium is interesting and helpful. It needs to be more forcefully brought to the attention of the larger research community, and it needs a good deal of discussion and debate.

All of this still leaves us as practicing researchers without any clear idea of how to proceed in many of the situations we face. The National Association of Elementary School Principals is among the groups to note the need for carefully worked out standards and guidelines regarding confidentiality and school records (Cutler, 1975, p. 49). The National Council for the Social Studies recently published in its journal a position statement on student rights and responsibilities, and specifically dealt with the privacy issue (Social Education, 1975). I believe it is time for AERA to do something more than talk.

I am not sure as I write this paper what my colleagues on the symposium will say on the matter, but I expect we are all going to articulate the need for standards and guidelines. I suggest that a special study committee, with a charge to bring forth the draft of a detailed document by the time of the 1977 meeting, is in order. Each of the divisions should then react and make suggestions for changes,

and a final version should be brought together for general approval.

Conclusion. To reiterate the argument in the opening pages of this paper, there is no more fundamental right in our system than the right of privacy -- the right to be let alone. Current trends lead to a major assault on this right, and one of the great tests of the viability of our system is its ability to preserve this right in the face of increasing complexity and increasing needs for control. As part of the scientific community, we contribute to the assault on privacy. As Americans, it is part of our responsibility to counter this movement and to preserve our basic values.

In the larger sense, this is what the symposium is about, and when we consider the issue in these basic terms, it is obvious that strong action on the part of our professional association is needed and needed soon.

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